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DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D. C. 20548

FILE: B-187104

DATE: September 28, 1978

**MATTER OF: Joseph Hanyok, et al. - Restoration of
Forfeited Annual Leave**

DIGEST: Ten employees of Federal Communications Commission were advised on November 4, 1976, that use of annual leave might be restricted because of exigency of public business. Later they were restricted to use of 2 days of leave for remainder of year. Agency, which had approved restoration of forfeited leave, later revoked restoration on basis of 56 Comp. Gen. 470, April 1, 1977, as leave had not been first approved and then cancelled. Since there was determination of exigency and leave could not have been rescheduled during leave year, employees who had timely requested leave in writing may have forfeited leave restored. However, employees who did not request leave in Standard Form 71, or otherwise in writing, may not have forfeited leave restored since documentation requirement has not been met.

This action is in response to a request from the Honorable Richard E. Wiley, Chairman of the Federal Communications Commission (FCC), for our decision as to whether annual leave forfeited by ten employees at the end of the 1976 leave year because of an exigency of the public business may be restored.

In November 1976, the Laboratory Division of the FCC was confronted with an extraordinarily heavy workload which required completion before January 1, 1977. By memorandum dated November 4, 1976, the Chief of the Laboratory Division advised the employees that it might be necessary to restrict annual leave during the remainder of the year. The employees were requested to advise Mrs. Smith (apparently the timekeeper) if they were interested in taking leave and to submit Standard Forms 71. Later, in order to assure completion of the project, he advised the staff in a memorandum dated November 16, 1976, that they would not be permitted to take more than 2 days of annual leave for the balance of the leave year. On November 19, 1976, the FCC Chief Engineer signed a memorandum to the Executive Director listing the ten employees who would forfeit leave unless restoration was granted. The memorandum stated that the employees "would have scheduled annual leave for this time period" and requested that the ten employees be "allowed to carry-over their excess leave." Although

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he initially granted the leave restoration, the Executive Director subsequently rescinded the restoration.

In a memorandum dated June 3, 1977, the Executive Director explained that the rescission was based on his interpretation of our decision in Michael Dana, B-187104, April 1, 1977 (56 Comp. Gen. 470). In particular, the Executive Director stated that since there was nothing in the record to indicate that leave for the ten employees had been rescheduled in writing in advance, restoration was not possible, under our decision in Dana.

By a memorandum dated June 7, 1977, the Chief, Laboratory Division, requested the Executive Director to reconsider his action rescinding the leave restoration. His request stated in part:

"Recognizing the impact that this unprecedented workload would have, the Laboratory timekeeper in late October requested all staff members to notify her as to any leave that was requested for the period from that time until the end of the leave year. All advised her of their request, and some of them filed a leave slip at that time for my approval. * * * I should note here that a leave request covering the period December 6 through 23 had been submitted by Joseph Hanyok on October 12 and approved by me just before the urgency of the situation became apparent; this approval was then cancelled."

In view of these circumstances, the Chairman of the FCC has asked the following questions:

"1. Did the formal documentation, that is, the memoranda prepared by the Chief of the Laboratory Division and directed to his staff, constitute sufficient constructive scheduling in advance to meet the requirements of 5 USC 6304 (d)(1)(B) such that the leave in question may be restored, and certified for payment within regular payroll vouchers?

"2. Does scheduling in advance mean that an Application for Leave, SF-71, must be used?

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"3. Must an employee request leave when he has been advised beforehand that the exigencies of the public business require that no leave be granted?

"4. Must a supervisor grant the employee's request for leave knowing that he must at the same time cancel that leave?

"5. Whether salary payments for restored leave taken between January 13, 1977 and June 3, 1977 when restoration was rescinded, were improper payments, since restoration was rescinded, because of lack of scheduling?

"6. Would certification of vouchers for payment for leave within regular salary checks be improper if the leave in question is restored to the ten employees?"

We shall answer the Chairman's questions as follows.

Forfeited annual leave can be restored under the limited circumstances set out in section 6304(d)(1) of title 5, United States Code (Supp. III, 1973), which provides:

"Annual leave which is lost by operation of this section because of--

"(A) administrative error when the error causes a loss of annual leave otherwise accruable after June 30, 1960;

"(B) exigencies of the public business when the annual leave was scheduled in advance; or,

"(C) sickness of the employee when the annual leave was scheduled in advance;

shall be restored to the employee."

Our recent decision William D. Norsworthy, B-188264, March 7, 1978, 57 Comp. Gen. 325, clarified our earlier decision in Dana

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concerning the restoration of forfeited annual leave. We affirmed the Danz decision, which held that, for restoration under subsection (B) or (C) of the statute, the express requirement that the annual leave be scheduled in advance must be met. However, we construed subsections (B) and (C) as creating a right to restoration of annual leave when it was lost because of a public exigency or sickness and was not lost due to the fault of the employee. Consequently, when an employee submits a "bona fide, formal, and timely request for leave," there can be no discretion whether to schedule the leave or not. The agency must approve and schedule the leave either at the time requested by the employee or if that is not possible because of the agency's workload, at some other time. In the case of an exigency of public business the matter must be submitted to the designated official for his determination. Accordingly, where an employee demonstrates that, but for an administrative error in failing to schedule requested leave or to present the case to the proper official for a determination of a public exigency, he would be entitled to restoration of leave under subsection 6304(d)(1)(B), then such leave may be restored under subsection 6304(d)(1)(A). See Norsworthy, supra, and decision John Connor, B-189085, April 3, 1978.

The requirement that the employee submit a formal and timely request for leave emanates from the congressional intention that section 6304(d)(1) would authorize restoration of leave lost through no fault of his own, but would not authorize restoration of leave lost because the employee on his own volition chose not to use leave. See Norsworthy, supra. Also see decision George D. Simpson and Olin C. Stewart, B-187104, March 8, 1978, and court case cited therein. Thus, the requirement places a reasonable burden on the employee to prove that leave was not lost because he chose not to use it. This burden is met, and the congressional intention is satisfied if the employee submits a written request for a certain period of leave as required by paragraph 5(3)(c) of the attachment to Federal Personnel Manual Letter 630-22. It is not necessary that a Standard Form 71 be submitted, but it is necessary that the application be in writing. Conversely this burden is not met when an employee does not submit a written leave application. This is particularly so in a case such as this where employees have been advised to submit a Standard Form 71 if they wish to take leave.

As noted above, the Chairman has asked whether the memoranda prepared by the Chief of the Laboratory Division regarding the use

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of annual leave would constitute sufficient constructive scheduling in advance to permit restoration of forfeited leave. The first memorandum merely advised of a possible leave restriction and the second one simply placed a 2-day limit on the amount of leave the employees could take. Thus, they did not affirmatively schedule leave for any employee. Further, the memoranda do not disclose whether the employees requested leave, which they were unable to take, or whether they chose not to use leave. Since the memoranda do not satisfy the burden of ascertaining the employees' intentions with respect to the use of leave, they do not meet the requirements of 5 U.S.C. § 6304(d)(1)(B) to permit restoration. Question 1 is answered accordingly.

Although an agency may be unable by reason of an exigency of the public business to grant a request for leave, there is still an obligation on the employee to prove that the leave was not lost because he chose not to use it. Thus, the employee must have submitted a request for leave in order to be eligible for restoration. As noted above, that requirement is met if the employee submits a written request, by Standard Form 71 or otherwise. Finally, where, as here, an agency is unable for the balance of the leave year, to approve and schedule an employee's request for leave, the agency will not be required to perform the needless task of approving and immediately cancelling the leave. However, as noted in Norsworthy, the agency has no discretion whether or not to schedule the leave. If the agency is unable, due to an exigency of the public business, to reschedule the requested leave during the current leave year, the failure to submit the matter to the designated official for his determination of the exigency constitutes an administrative error which would support a restoration of the requested leave pursuant to 5 U.S.C. § 6304(d)(1)(A). Questions 2-4 are answered accordingly.

The Chairman's last two questions concern the propriety of salary payments made which reflect restored leave taken by the ten employees here. With respect to Mr. Joseph Hanyok it appears that his request for leave had previously been approved, and was subsequently cancelled because of the exigency. Since the leave could not be rescheduled and the proper agency official has determined that an exigency in fact existed, we have no objection to restoration in the case of Mr. Hanyok. Regarding the other employees, the record indicates that all of them advised the agency timekeeper of their request for leave and some of

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them submitted leave slips for the approval of the Chief, Laboratory Division. In accordance with the above, the requests for specific periods of leave submitted in writing, even though not approved, would support a leave restoration action. However, where the employees did not submit written leave requests there has been no documentation to support a leave restoration action. Thus, to the extent that restoration is allowable, the salary payments which reflect restored leave taken would be proper. The FCC should determine whether waiver action under 5 U.S.C. § 5584 is warranted in those cases in which leave was erroneously restored and used.

Acting

R. K. K. K.
Comptroller General
of the United States